Supreme Court, U.S.
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No. 98-1960

In The

Supreme Court of the United States

CORTEZ BYRD CHIPS, INC.,

Petitioner,

v.

BILL HARBERT CONSTRUCTION COMPANY,
a division of Bill Harbert International, Inc.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States District Court for the district in which an arbitral award is made has jurisdiction to confirm the award despite the prior filing, in another district, of an action seeking to vacate the award.

PARTIES TO THE PROCEEDING

Respondent has no parent corporation and no non-wholly owned subsidiary.

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9 U.S.C. § 9 ..... *passim*

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Michael G. Schwartz & Amy Yip-Kikugawa, *Sunshine Beauty Supplies, Inc. v. United States District Court: Mandatory Venue and Motion to Confirm or Vacate Under the Federal Arbitration Act*, 32 U.S.F. L. Rev. 629 (1998) 7

STATEMENT OF THE CASE

Respondent, an Alabama corporation, is in the business of commercial construction. Respondent's principal place of business is in the State of Alabama. In 1995, Respondent entered into a contract with Petitioner, a Mississippi corporation, to erect a wood chip mill in Mississippi. The contract required arbitration of any disputes between the parties under the Construction Industry Arbitration Rules of the American Arbitration Association. The contract further provided that the arbitral award "shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof."

Having suffered excess expenditures, labor, and overhead as a result of actions by Petitioner and its designer and fabricator, Respondent filed a demand for arbitration on April 30, 1997, with the Atlanta, Georgia office of the American Arbitration Association (the "AAA"). The AAA determined that the proceeding should be conducted in Birmingham, Alabama. In November 1997, the arbitration panel conducted a four-day hearing in Birmingham, Alabama, during which testimony, other evidence, and arguments were presented by both parties.[1]

On December 10, 1997, the arbitration panel made an award in favor of Respondent and against Petitioner, under which Petitioner owes Respondent a net sum of

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[1] Contrary to the statement in Petitioner's petition, counsel for Respondent did not "admit[ ] [during these proceedings] that no written change order was ever executed." Pet. 4.

$274,256.90, together with post-award interest at the rate of 10% per annum.

On January 13, 1998, Petitioner filed an action in the United States District Court for the Southern District of Mississippi (Civil Action No. 3:98-CV-43-BN) seeking to vacate or modify the award. Rather than providing a basis for vacatur within the limitations of 9 U.S.C. § 10, Petitioner's complaint alleged only that the award was incorrect – that is, that the arbitrators' decision disregarded the "facts" and was contrary to the parties' agreement. The complaint characterized the arbitral award as "illogical," "irrational," "an exhibition of bad faith," "of a grievously flawed character," "arbitrary and capricious," and "constitut[ing] the arbitrators' own private brand of justice."

Unaware of the Mississippi district court filing, Respondent filed the present action in the United States District Court for the Northern District of Alabama on January 20, 1998, to confirm the arbitral award. Petitioner responded with a counterclaim seeking vacatur of the award on the same grounds set forth in its complaint in the Mississippi district court. Petitioner also filed a motion to dismiss, transfer, or stay the Alabama district court action based on the pendency of the action in the Mississippi district court. The court denied this motion, holding it had exclusive jurisdiction over any action to confirm or vacate the award.

On May 21, 1998, the Alabama district court confirmed the arbitral award, entering final judgment in favor of Respondent for the net sum of $274,256.90. The district court noted that Petitioner "did not articulate a

single legal ground pursuant to 9 U.S.C. § 10 by which the arbitration can be vacated (other than to plead, without evidentiary support, a "laundry list" of grounds in a purely conclusory manner)." Pet. App. 12a.

At the time the Alabama district court entered judgment confirming the arbitral award, the Mississippi district court had neither entered any order confirming, modifying, or vacating the award, nor conducted any hearing for that purpose. Thereafter, on June 23, 1998, the Mississippi district court entered an order staying further proceedings pending issuance of a mandate by the Eleventh Circuit, and no further action has been taken in that case.

On appeal to the United States Court of Appeals for the Eleventh Circuit, Petitioner did not challenge the Alabama district court's finding that it had failed to articulate a cognizable basis for vacatur of the arbitral award. Rather, Petitioner argued only that venue was proper in both the Alabama and Mississippi districts and that, therefore, the "first-to-file" rule prohibited the Alabama district court from proceeding. The Eleventh Circuit Court of Appeals, by a three-judge panel, affirmed on the basis that the *panel* was bound by the pre-split Fifth Circuit decision in *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974) (*"Naples"*), under which the Northern District of Alabama was the exclusive forum for adjudication of the action. Pet. App. 1a. Petitioner did not seek rehearing *en banc*.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THERE IS NO COMPELLING REASON TO GRANT THE WRIT

Respondent acknowledges that the circuit courts of appeals are split on the issue of whether the district in which an arbitral award is made is the exclusive venue for actions under Sections 9 and 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 9, 10. Contrary to Petitioner's argument, however, there is no compelling need for this Court to resolve the conflict. A review of the decisions of the circuit courts suggests that, given the opportunity to do so, they may resolve the conflict without this Court's intervention.

City of Naples v. Prepakt Concrete Co., 490 F.2d 182 (5th Cir. 1974), which the Eleventh Circuit panel below found to be controlling, was the seminal decision on this issue. In *Naples*, a panel of the former Fifth Circuit held that Section 9 of the FAA places venue exclusively within the district in which the arbitration award was made.

> [I]n view of § 9's command, and for reasons of judicial restraint and comity, the District Judge [in Florida] should have declined to enjoin the confirmation proceeding in the Ohio District Court. The arbitration hearing had lawfully taken place in Ohio. . . . Diversity of citizenship existed. . . . Therefore, under § 9, the Ohio District Court was the proper court to confirm, vacate, modify, or correct the arbitration award.

Id. at 184 (citations omitted).

In 1984, the Sixth Circuit reached the same conclusion in *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046, 1050 (6th Cir. 1984). The following year, in *Central Valley Typographical Union No. 46 v. McClatchy Newspapers*, 762 F.2d 741 (9th Cir. 1985), the Ninth Circuit aligned with the Fifth and Sixth Circuits in holding that venue under 9 U.S.C. § 10 was exclusive.

Indeed, prior to 1989, the only circuit court that had reached a decision contrary to *Naples* was the Second Circuit. *Motion Picture Lab. Technicians Local 780 v. McGregor & Werner, Inc.*, 804 F.2d 16, 18-19 (2d Cir. 1986); *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 706 (2d Cir. 1985), *cert. denied*, 475 U.S. 1067 (1986). In 1989, however, the trend toward finding these venue provisions to be exclusive dramatically reversed.

In 1989, both the Fifth and Ninth Circuits faced this issue for the second time. In *Sunshine Beauty Supplies, Inc. v. United States Dist. Ct.*, 872 F.2d 310, 312 (9th Cir. 1989), a panel of the Ninth Circuit found itself bound by court precedent and held that the venue provision in Section 10 was mandatory. The Fifth Circuit, however, moved in the other direction. In *Purdy v. Monex Int'l, Ltd.*, 867 F.2d 1521 (5th Cir.), *cert. denied*, 493 U.S. 863 (1989), the court held, without citing its contrary decision in *Naples*, that Section 9 "does not establish an exclusive forum for suits upon arbitral awards." *Id.* at 1523.

Since 1989, all circuit courts addressing the issue, with the exception of the decision below, have found the venue provisions of 9 U.S.C. §§ 9 and 10 to be permissive. *In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994), considered to be a leading decision holding venue to be

permissive under these sections, was decided in 1994. In *Sutter Corp. v. P&P Indus., Inc.*, 125 F.3d 914, 919 (5th Cir. 1997), the Fifth Circuit reaffirmed its holding in *Purdy* that venue under 9 U.S.C. § 9 is permissive, this time expressly recognizing and rejecting its earlier decision in *Naples*. In 1998, the Fourth Circuit in *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 191-92 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 178 (1998), found *VMS* persuasive and held venue under Section 9 to be permissive, rather than mandatory. Most recently, the Tenth Circuit has joined the majority of circuits in *P&P Indus., Inc. v. Sutter Corp.*, No. 98-6358, 1999 WL 339699 (10th Cir. May 28, 1999), in finding venue under Sections 9 and 10 to be permissive.

The present case was the Eleventh Circuit's first opportunity to address this issue. Under the law of the Eleventh Circuit, however, a three-judge panel is powerless to reverse circuit precedent. *Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998). Moreover, the Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*). Consequently, while the Fifth Circuit had already rejected its decision in *Naples*, the Eleventh Circuit's three-judge panel found that it was powerless to do so, and that *Naples* controlled the decision in this case.

Although it noted the circuit split on the venue issue, the Eleventh Circuit panel decision did not, as Petitioner states, "suggest[ ] that [this] Court's guidance was needed to resolve this conflict." Pet. 6. Rather, because the Eleventh Circuit *en banc* could have revisited *Naples*,

the opinion below should be read simply as inviting an application for rehearing *en banc*. Nevertheless, for reasons not apparent from the record, Petitioner elected not to seek rehearing *en banc*, thus depriving the Eleventh Circuit of the opportunity to give independent consideration to the issue.

Petitioner quotes a student note[2] as stating, "The United States Supreme Court should grant certiorari to the next eligible case and create a uniform rule for the circuits to follow." Pet. 6. In fact, the quoted sentence advocates review by this Court only "if the Ninth Circuit is unwilling to reverse its own precedent." *Id.* The Ninth Circuit has had no opportunity to reconsider its position in the ten years since its panel decision in *Sunshine Beauty Supplies*, and that decision was dictated by the court's 1985 *Central Valley* holding. Similarly, the Sixth Circuit has not had occasion to reconsider this issue since its 1984 decision in *Island Creek*.

If the Eleventh Circuit had upheld *Naples* in an *en banc* decision or denied rehearing *en banc*, or if the Sixth or Ninth Circuit had done the same with respect to their aging precedent, it might be argued that resolution of the circuit split would require this Court's intervention. As matters now stand, however, it appears that, rightly or wrongly, the circuits may be moving toward consensus on this issue. Because the issue does not affect fundamental rights, but only venue of actions, there is no urgent

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[2] Michael G. Schwartz & Amy Yip-Kikugawa, *Sunshine Beauty Supplies, Inc. v. United States District Court: Mandatory Venue and Motions to Confirm or Vacate Under the Federal Arbitration Act*, 32 U.S.F. L. Rev. 629 (1998).

need for this Court to take action and thus no compelling reason why the Petition for Writ of Certiorari should be granted.

II. THE DETERMINATIVE ISSUE IN THIS CASE IS ONE OF DISCRETION – THAT IS, WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO APPLY THE "FIRST-TO-FILE RULE"

Regardless of whether venue is permissive or mandatory under Sections 9 and 10 of the FAA, the Northern District of Alabama was a proper forum for proceedings to confirm, modify, or vacate the arbitral award in this case. The issue raised by Petitioner thus is not one of jurisdiction or venue, but of comity – that is, whether the Alabama district court was required to defer to the Mississippi district court under the "first-to-file rule."

The "first-to-file rule" is discretionary. The Fifth Circuit has described the rule as follows:

> The federal courts long have recognized that the principle of comity requires federal district courts – courts of coordinate jurisdiction and equal rank – to exercise care to avoid interference with each other's affairs. . . . The concern manifestly is to avoid the waste of duplication, to avoid rulings which may trench upon the authority of sister courts, and to avoid piecemeal resolution of issues that call for a uniform result. . . . To avoid these ills, a district court *may* dismiss an action where the issues presented can be resolved in an earlier-filed action pending in another district court.

West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, 751 F.2d 721, 728-29 (5th Cir. 1985) (emphasis added) (citations omitted).

Other circuit courts have similarly held that the "first-to-file rule" is not mandatory, but is reviewed for abuse of discretion. *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991); *First City Nat'l Bank & Trust Co. v. Simmons*, 878 F.2d 76, 80 (2nd Cir. 1989). The "first-to-file rule" is merely a "general principle" of law, *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), or a "rule of thumb," *see Smith v. SEC*, 129 F.3d 356, 361 (6th Cir. 1997). As the Court held in *Smith v. SEC*:

> When a federal court is presented with such a duplicative suit, it may exercise its discretion to stay the suit before it, to allow both suits to proceed, or, in some circumstances, to enjoin the parties from proceeding in the other suit.

Id. (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952)).

In this case, the two district court complaints were filed only a week apart. Respondent was unaware of the Mississippi action at the time it filed suit in Alabama. Because the Mississippi district court had not engaged in any substantive proceedings before the Alabama district court's entry of final judgment, there was no "interference" with the affairs of the Mississippi district court. In view of the AAA's determination that the Northern District of Alabama was the most appropriate venue for the arbitration proceedings, the plain lack of merit in the

Petitioner's challenge to the arbitral award, and the controlling precedent of *Naples*, the Alabama district court did not abuse its discretion in declining to defer to the Mississippi district court. Moreover, while Petitioner argues that the Eleventh Circuit's decision must be overruled to reduce the "technicality, delay, and expense" of arbitration proceedings, Pet. 13, none of these goals would be served by requiring the enforceability of the arbitral award to be relitigated in the Mississippi district court.

Regardless of whether the Alabama district court was the exclusive, or one of many permissible venues under 9 U.S.C. §§ 9 and 10, the court had discretion to enter judgment, rather than deferring to the Mississippi district court. Because the issue addressed in the Petition for Writ of Certiorari does not affect the outcome of this case, this case does not provide an appropriate vehicle for this Court's consideration of the issue, and the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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